MOTION FILED
SEP 10 1985

(9)

No. 84-1484

BEST AVAILABLE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, *et al.*,
Appellants,

v.

GOULD INC.,
Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE APPELLEE

Of Counsel:
STEPHEN A. BOKAT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

PETER G. NASH *
DIXIE L. ATWATER
OGLETREE, DEAKINS, NASH, SMOAK & STEWART
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-0855
Counsel for the Chamber of Commerce of the United States of America, Amicus Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

36 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1484

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, *et al.*,

Appellants,

v.

GOULD INC.,

Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

---

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Pursuant to Rule 36.3 of the Rules of the Supreme Court of the United States, the Chamber of Commerce of the United States of America ("the Chamber") respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* urging affirmance of the Seventh Circuit's judgment. In support of this motion, the Chamber states as follows:

1. This motion is necessitated by the refusal of the Assistant Attorney General of Wisconsin, counsel of record for Appellants, to consent to the filing of a brief

amicus curiae by the Chamber. Counsel for Gould Inc., the Appellee, has consented to the Chamber's brief.

2. The Chamber is a federation consisting of approximately 180,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States. A significant aspect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing *amicus curiae* briefs in a wide spectrum of labor relations litigation before this Court,[1] including the other labor preemption case pending before the Court this term (*Golden State Transit Corporation v. City of Los Angeles*, No. 84-1644).

3. The instant case presents the issue of whether a state may enforce statutes barring an employer from doing business with the state if the employer has violated the National Labor Relations Act ("the Act" or "NLRA"). Specifically, this Court must decide whether the federal Act preempts Wisconsin statutes which prohibit the State's departments and agencies from purchasing any product manufactured or sold by an employer that has been found guilty of three separately enforced violations of the NLRA.

---

[1] E.g., *Allis-Chalmers Corp.* v. *Lueck*, —— U.S. ——, 85 L. Ed. 2d 206 (1985); *Trans World Airlines v. Thurston*, —— U.S. ——, 83 L. Ed. 2d 523 (1985); *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519 (1979); *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397 (1976); *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975); *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368 (1974); *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267 (1974).

4. These issues are of vital concern to the Chamber and its members, many of whom do substantial amounts of business with state and municipal government agencies and departments. For if Wisconsin may debar government contractors for three years because of three labor law violations, then there is no reason why the hundreds of state and municipal governments throughout the country cannot impose their own debarment rules based on their own ideas about what national and local labor policy requires. Thus, Chamber members, like employers everywhere, may find themselves foreclosed from substantial markets for varying periods of time (three years, five years, ten years, etc.) for whatever labor-relations conduct those government entities deem worthy of punishment (three labor law violations, one labor law violation, being the object of a strike, etc.). Moreover, it is not just adjudged labor law violators who will suffer under such legislation, for the Wisconsin statutes bar not only direct purchases from labor law violators but also the purchase of any product which contains a component manufactured by the debarred company. Consequently, even employers with spotless labor records will inevitably find it necessary at times to disrupt established business relationships and alter modes of production or procurement in order to maintain their eligibility for state and local government contracts.

5. The ramifications of this Court's ruling in the present case will plainly transcend the narrow question of whether Wisconsin may refuse to deal with three-time labor law violators. The presence in the case of three *amici curiae* supporting the State of Wisconsin attests to the importance of the issues to state and local governments and to labor organizations. The issues are equally important to employers in the United States, and as a representative of many of those employers, the Chamber urges that it be permitted to present their views.

WHEREFORE, the Chamber respectfully requests that it be granted leave to file the accompanying brief *amicus curiae* in support of Gould Inc.

Respectfully submitted,

Of Counsel:

STEPHEN A. BOKAT

NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

PETER G. NASH *
DIXIE L. ATWATER

OGLETREE, DEAKINS, NASH, SMOAK & STEWART
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-0855

Counsel for the Chamber of Commerce of the United States of America, Amicus Curiae

* Counsel of Record

Dated: September 10, 1985

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	7
A. The Wisconsin Statutes Are Preempted Under Traditional Preemption Principles	7
B. The Wisconsin Statutes Are Not Saved From Federal Preemption By The Fact That The State Allegedly Acted As A "Market Participant" Rather Than As A Direct Regulator Of Conduct	18
CONCLUSION	27

TABLE OF AUTHORITIES

Cases: Page

Automobile Workers v. Russell, 356 U.S. 634 (1958) 9, 12, 13
Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975) 12
Edison v. Labor Board, 305 U.S. 197 (1939) 13
Farmer v. Carpenters, 430 U.S. 290 (1977) 8, 9
Garner v. Teamsters Union, 346 U.S. 485 (1953) .. 10, 16
Hughes v. Alexandria Scrap Corporation, 426 U.S. 794 (1976) 19, 20
Lefkowitz v. Turley, 414 U.S. 70 (1973) 21
Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) 9
Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976) 13, 23
Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971) ..... *passim*
Nash v. Florida Industrial Commission, 389 U.S. 235 (1967) 23
New York Telephone Co. v. New York Department of Labor, 440 U.S. 519 (1979) 23
Reeves, Inc. v. Stake, 447 U.S. 429 (1980) 19
Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940) .. 13
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) ..... *passim*
South-Central Timber Development, Inc. v. Wunnicke, —— U.S. ——, 81 L. Ed. 2d 71 (1984) 19, 24
White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983) 19, 24
United Building and Construction Trades Council v. Mayor and Council of Camden, —— U.S. ——, 79 L. Ed. 2d 249 (1984) 21

Constitutions and Statutes:

United States Constitution
Commerce Clause, Article I, Section 8, Clause 3 ..... *passim*
Supremacy Clause, Article VI, Clause 2 ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
Davis-Bacon Act, 40 U.S.C. § 276a-2	25
National Labor Relations Act, 29 U.S.C. § 151, *et seq.*	*passim*
Service Contract Act, 41 U.S.C. § 354	25
Walsh-Healey Act, 41 U.S.C. § 37	25
Miscellaneous:	
Congressional Record, October 5, 1977	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1484

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, *et al.*,
Appellants,

v.

GOULD INC.,
Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

---

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE APPELLEE

INTEREST OF THE *AMICUS CURIAE*

A statement describing the Chamber of Commerce of the United States of America ("the Chamber") and its interest in this case is set forth in the preceding motion for leave to file this *amicus curiae* brief.

SUMMARY OF THE CASE

In the case before the Court for review, the District Court (576 F. Supp. 1290) and the United States Court of Appeals for the Seventh Circuit (750 F.2d 608) both held that Wisconsin's "Labor Law Violators List" stat-

utes, which blacklist labor law violators, were preempted by the National Labor Relations Act ("NLRA" or "the Act"). The decisions were based on a simple, stipulated record which is summarized briefly below.

In 1980 the Wisconsin legislature enacted two new provisions (Wisc. Stats. §§ 101.245 and 16.75(8)) which are commonly referred to as the "Labor Law Violators List" statutes. The statutes require the State Department of Industry, Labor and Human Relations to maintain a list of employers who have had three or more NLRB unfair labor practice findings affirmed by three different final decisions of a federal court of appeals within the preceding five years (576 F. Supp. at 1292). The statutes apply whether or not the labor law violations occurred in the State of Wisconsin and whether or not any citizen or resident of Wisconsin is in any way affected by the employer's unfair labor practices. Indeed, in this case all of Gould's unfair labor practices were committed in states other than Wisconsin (750 F.2d at 210).

Once an employer's name is placed on the list, it remains there for three years. During that time, the departments and agencies of the State are barred from purchasing "any product known to be manufactured or sold" by the employer (Section 16.75(8)). Further, at least in this case, the State has construed the statute to preclude the State from purchasing products from any other seller where those products contain component parts produced by the debarred company (576 F. Supp. at 1293).

On August 25, 1982, Gould was notified that its name was being placed on the labor law violators list, that its contracts with the State would be canceled and that it would be debarred from bidding for State procurement contracts until July 1, 1985. The State also notified all current and potential State vendors that they could not sell products to the State of Wisconsin which contained Gould-produced components (576 F. Supp. at 1293). All

of these actions were based on the fact that four of Gould's twenty separate and autonomous divisions had been the subject of court-enforced findings of NLRA violations within the preceding five years. By the time Gould was placed on the labor law violators list, Gould had remedied all the violations of the Act and all four of those divisions had been sold (*id.*).

In early 1983, Gould sought and obtained a preliminary injunction ordering the State of Wisconsin [1] to honor Gould's existing contracts, to entertain future bids by Gould and to revoke all notices to State agencies and vendors that Gould was barred from doing business with the State (576 F. Supp. at 1292). Thereafter, the District Court issued a permanent injunction based on its conclusion that the Wisconsin statutes were preempted by the National Labor Relations Act because they impermissibly added a penalty for violation of the NLRA and burdened Gould's federal appeal rights under the Act. Although the Court of Appeals found that the Wisconsin statutes did not impermissibly burden Gould's right to judicial review of NLRB decisions, it affirmed the District Court's preemption conclusion on the basis of the penalty imposed by the statutes. The matter is now before this Court on that preemption issue.

SUMMARY OF ARGUMENT

This Court's preemption decisions have made it clear that Congress enacted the NLRA to establish a single, consistent scheme governing labor-management relations for the nation and, to that end, to exclude state and local actions based on their own parochial views of proper labor policy. An integral part of Congress' regulatory scheme was its decision to impose certain remedies for

---

[1] The District Court dismissed all but the individual State official defendants on Eleventh Amendment immunity grounds. For ease of reference, however, we will treat the State of Wisconsin as the appellant before this Court.

violations of the Act and to withhold other remedies, including such punitive measures as debarment from government contracting.

The remedies Congress chose not to impose upon violators of the NLRA are as critical to the scheme and purpose of the Act as are the ones it chose to impose. Accordingly, it does not avail the State of Wisconsin to argue that its debarment remedy does no more than supplement the NLRA by imposing an additional sanction in furtherance of that Act's policy of prohibiting certain employer conduct. Such an argument is based upon too narrow a reading of the purpose of the NLRA. The NLRA was not enacted simply to prohibit employer conduct. Rather, the Act prohibits and remedies certain conduct as a means (not an end) of ensuring that the Act's main purpose is achieved—i.e., that labor and management will engage in the process of free collective bargaining to reach a voluntary agreement on employee working conditions. That voluntary bargaining process is tough enough to achieve without further burdening it with the imposition of draconian penalties, such as debarment, for Labor Act violations. Accordingly, the withholding of such penalties by Congress is as much in furtherance of the Act's basic purpose as is the imposition of specific remedies for Labor Act violations, and the imposition of such penalties by state and local governments (such as the State of Wisconsin) is preempted lest they frustrate the NLRA's single, consistent, national labor policy favoring voluntary collective bargaining.

The tougher issue in this case, and an issue of first impression for the Court, is whether the State's action here avoids preemption simply because the State is allegedly acting as a "market participant" rather than as a direct regulator of employer labor relations conduct. The State of Wisconsin argues that it is free to select from whom it will purchase goods and services, and that, just like any private purchaser, it may decide with whom it will

do business. And, says the State, because a private company could decide not to do business with a labor law violator, so can the State of Wisconsin.

We respectfully submit that the State's argument is overly simplistic and must fail. The fact that a private employer may choose to avoid doing business with a labor law violator misses the point. The Supremacy Clause of the Constitution prohibits state and local government action that is inconsistent with an act of Congress—not private employer action. Private employer action is regulated, if at all, by the terms of the statutes Congress enacts. State action is limited by the constitutional dictate that state and local governments may not interfere with the scheme Congress has chosen to regulate private employer conduct.

Moreover, "debarment" is, by definition, only a market participation decision—i.e., a decision not to do business with another. If states may make their "market participation decisions" free of any constitutional challenge, then, by definition, all states may impose a debarment penalty no matter how frustrating that may be to the goals of the Constitution or the laws enacted by Congress. Clearly the "market participation" defense cannot be used to produce that result.

The "market participant" doctrine is relevant to the constitutional question of whether the state's market decisions create trading barriers and thus violate the Commerce Clause, but it is not relevant to challenges of state action under other provisions of the Constitution, including, as in the instant case, the Supremacy Clause. The Supremacy Clause dictates that the laws of Congress (such as the NLRA) shall be supreme and shall preempt inconsistent state action. It matters not whether that action takes the form of direct regulation or indirect regulation by use of a state's purchasing power. In essence, all the State's contention establishes in this case is that if

Congress had never enacted the NLRA, the State's decision to bar labor law violators from selling to the State might not violate the Constitution.

Further, the debarment statutes at issue here would not meet even the Commerce Clause definition of legitimate and constitutionally permissible "market participation" decisions. Specifically, Wisconsin's decisions to debar have nothing to do with purchasing decisions and everything to do with regulating conduct generally. The debarment statutes have nothing to do with the price or quality of goods, they accomplish nothing for Wisconsin industry or its working citizens and they debar not only labor law violators but other employers who do business with those violators. In sum, the State of Wisconsin has acted as a broad regulator of employer conduct, not as a simple "market participant."

Finally, if Wisconsin wins this case, every state and local government in the land could enact its own statutes or ordinances debarring labor law violators (one-time, three-time or ten-time violators), employers who lawfully lock out employees, employers whose unions have violated the NLRA, employers subject to a strike, employers who don't have collective bargaining agreements etc., etc., etc. In sum, the single, consistent, nationwide labor policy sought by Congress when it enacted the NLRA could become hundreds of separate and conflicting policies.

For the foregoing reasons, more fully explained below, we respectfully submit that the Wisconsin debarment statutes at issue in this case should be struck down as inconsistent with the NLRA and, thus, as violative of the Supremacy Clause of the Constitution.

ARGUMENT

This case presents the Court with a slightly different, but clearly not dispositive, twist on the doctrine of labor preemption—whether a state's blacklisting of federal labor law violators from direct and indirect government contracting is immune from preemption because the state is acting through the mode of market participation rather than direct regulation of parties' conduct. As we show below, Wisconsin's sanctions against three-time labor law violators are foreclosed by traditional preemption principles developed by this Court, and the fact that those sanctions are imposed through the State's procurement powers does not change that result.

A. The Wisconsin Statutes Are Preempted Under Traditional Preemption Principles

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), this Court effected a "reorientation of [the labor] preemption doctrine." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 293-294 (1971). That reorientation involved a review of the federal premises underlying the exclusive jurisdiction of the NLRB and the announcement of a rule that the courts were henceforth to apply in determining when the National Labor Relations Act precludes states from acting on matters which the Act commits to the NLRB:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.

359 U.S. at 244. Indeed, the *Garmon* Court held that once "the Board decides . . . that conduct is protected by § 7 or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction" (*id.* at 245).

Application of that straightforward standard to the instant case admits of only one conclusion. The "activity" at which the Wisconsin statutes are aimed is conduct which undeniably constitutes an unfair labor practice under the NLRA. By definition, the statutes do not operate except upon three NLRB and appellate court determinations that an employer has violated the Act, and Wisconsin has conceded that the purpose of the statutes is to discourage federal labor law violations by employers (576 F. Supp. at 1297; 750 F.2d at 611). Accordingly, under the plain language of this Court's *Garmon* rule, Wisconsin should be foreclosed from acting with respect to these activities.

To be sure, the Court has held that the general *Garmon* rule cannot be applied mechanistically and that the Court must determine the scope of that rule by "examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme." *Farmer v. Carpenters*, 430 U.S. 290, 297 (1977). Indeed, *Garmon* itself recognized that the states' power to act is not withdrawn "where the activity regulated [is] a merely peripheral concern of the Labor Management Relations Act . . . [o]r where the regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Garmon*, *supra*, 359 U.S. at 243-244.

Wisconsin asserts that its actions fall within these *Garmon* exceptions because the question of whether Gould and Wisconsin do business together is a "peripheral concern" of the NLRA and because the State has a substantial interest in choosing its trading partners (Wisconsin Brief at 18-19, 44-46). But Wisconsin simply misses the point with that contention. In determining whether state action is permitted by the "peripheral concern" and "deeply rooted local feeling" exceptions, this Court has

consistently focused on the state's interest in controlling the *conduct being regulated*, not on the method used to regulate. For example, in *Garmon* itself the Court phrased the test in terms of whether the "activity regulated" was a peripheral concern of the NLRA or whether the "regulated conduct" touched deeply rooted local interests (359 U.S. at 243-244). Indeed, the *Garmon* Court specifically stated that "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." 359 U.S. at 243.[2]

In short, Wisconsin's interest in choosing its trading partners is not the pertinent question. It has chosen not

---

[2] This Court's other decisions have been similarly focused. *E.g.*, *Farmer v. Carpenters, supra*, 430 U.S. at 297 (state interest in protecting citizens from outrageous conduct intentionally inflicting emotional distress); *Linn v. United Plant Guard Workers*, 383 U.S. 53, 61-62 (1966) (Michigan's " 'overriding state interest' in protecting its residents from malicious libels"); *Automobile Workers v. Russell*, 356 U.S. 634 (1958) (state interest in the maintenance of domestic peace by regulating violence and imminent threats to public order). Although the *Russell* opinion itself is not free from ambiguity in terms of the rationale for finding no preemption, this Court has subsequently made clear that preemption was not appropriate in *Russell* because the case involved violence and threats of violence. *Garmon, supra*, 359 U.S. at 247; *Lockridge, supra*, 403 U.S. at 297 n.7.

Moreover, courts must look to the realistic substance of a state's action, rather than the label placed on it, in determining the validity of that action. In *Lockridge*, for example, the Court held that a state court action was not saved from preemption merely because the complaint charged the defendant union with a breach of contract (based on the union's constitution) in suspending the plaintiff from membership rather than with an unfair labor practice in procuring his dismissal. The Court stated (403 U.S. at 292):

> It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern. . . .
>
> . . . At bottom, of course, the Union's action in procuring [plaintiff's] dismissal from employment is the conduct which Idaho courts have sought to regulate.

to trade as its *means* of regulating unfair labor practice conduct.[3] Thus, in order to sustain its contention that its statutes fall within these *Garmon* exceptions, Wisconsin must convince this Court that the activities at which those statutes are directed—the commission of unfair labor practices—are a peripheral concern of the NLRA and are a permissible subject of deeply rooted local interest.

To pose this issue is to answer it. Violations of the NLRA are an obvious and vital concern of the Act, and Wisconsin has no cognizable local interest in regulating them. Although the State of Wisconsin may, *in fact*, have "a deeply rooted interest in compliance with the labor law," as it asserted in the Court of Appeals (750 F.2d at 611), that is *precisely* the "local interest" which Congress meant to override when it passed the National Labor Relations Act. See, e.g., *Lockridge*, *supra*, 403 U.S. at 286 (the primary factor in the development of the NLRA was the "perceived incapacity of common-law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict. . . ."); *Garner v. Teamsters Union*, 346 U.S. 485, 490 (1953) (Congress considered centralized administration of the Act necessary, *inter alia*, to avoid

---

[3] Even if a state's interest in choosing its trading partners might be a proper consideration in preemption analysis in other contexts, any alleged Wisconsin interest in that area can only be deemed illusory in the instant case. As we discuss more fully in Section B, *infra*, Wisconsin did not enact the statutes *sub judice* in order to protect the economic or physical well-being of its citizens. Indeed, there is even no nexus between the Wisconsin statutes and any direct labor relations interest of the State's citizenry—the statutes apply irrespective of whether the unfair labor practices were committed within the state or without and irrespective of whether the company division violating the Act even operates within or seeks to sell to the State of Wisconsin. Thus, Wisconsin's only interest in this case is in imposing its view of proper labor relations policy and sanctions—an interest that is foreclosed from action by the NLRA.

the diversities and conflicts that might result from local attitudes toward labor controversies).

Wisconsin asserts, however, that its debarment statutes should not be preempted because its debarment remedy does not conflict or interfere with the NLRA, but rather, supplements and enhances the NLRA remedial scheme. We respectfully submit that Wisconsin's debarment statutes do impermissibly interfere with the Act and that the State's contention to the contrary is based upon too narrow a reading of the NLRA.

First, the primary goal of the NLRA is not, as the State and its supporting *amici* seem to argue, the elimination of employer and union unfair labor practice conduct. The fundamental and ultimate goal of the Act is to encourage collective bargaining—a process by which management and labor meet and voluntarily bargain an agreement setting employee terms and conditions of employment. 29 U.S.C. § 151. The regulation of employer misconduct by means of the unfair labor practice provisions of Section 8(a) (29 U.S.C. § 158(a)) is but a means to that end. In recognition of that fact, Congress not only carefully chose what conduct would be proscribed, but also what sanctions would and would not be applied to remedy misconduct. Thus, Congress understood human nature and apparently believed that the imposition of certain remedies (including, most particularly, punitive remedies) would be contrary to its goal of voluntary and cooperative collective bargaining.

This Court has clearly recognized that Congressional judgment. In *Lockridge*, *supra*, 403 U.S. at 287, the Court stated:

> [T]he range and nature of those remedies that are *and are not available* is a fundamental part and parcel of the operative legal system established by the National Labor Relations Act. [Emphasis added.]

In *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 635 (1975), the Court said:

> The Court has held repeatedly that federal law preempts state remedies that interfere with federal labor policy or with specific provisions of the NLRA. . . . The use of state antitrust law to regulate union activities in aid of organization must also be preempted because it creates a substantial risk of conflict with policies central to federal labor laws.
>
> . . . If [state antitrust laws] take account of labor goals at all, they may represent a totally different balance between labor and antitrust policies. Permitting state antitrust law to operate in this field could frustrate the basic federal policies . . . and interfere with the detailed system Congress has created. . . . [Citations and footnotes omitted.]

And in *Automobile Workers v. Russell, supra*, 356 U.S. at 650, the dissent, which apparently now represents the views of the Court in cases involving other than violent activity (see *Lockridge, supra*, 403 U.S. at 297 n.7), stated:

> The Federal Act represents an attempt to balance the competing interests of employee, union and management. By providing additional remedies the States may upset the balance as effectively as by frustrating or duplicating existing ones.

Accordingly, Wisconsin's imposition of an additional sanction for NLRA violations—be it a "me too" sanction based on an NLRB adjudication or a sanction imposed after independent adjudication [4]—is in direct substantive

---

[4] The State has contended that its debarment statutes should not be preempted because the State does not and will not adjudicate whether an employer's actions violate or are permissible under the NLRA. Accordingly, says the State, there is no chance of conflict

conflict with the NLRA. And that conflict is heightened by the fact that, as we show below, Wisconsin's debarment remedy is not only punitive, rather than simply remedial, but is also a remedy Congress has specifically considered and rejected.

This Court has recognized that the National Labor Relations Act creates a national labor policy that is remedial rather than punitive. *See Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940); *Edison v. Labor Board*, 305 U.S. 197, 235-236 (1939). As noted above, there are sound reasons for this Congressional judgment—i.e., that a thoroughly punished employer may be less likely to engage in voluntary and cooperative collective bargaining than an employer who has been required only to make whole those injured by his misconduct.[5]

The debarment statutes at issue here obviously impose a penalty in direct conflict with Congress' policy judg-

---

with the NLRB's administration of the Act. But the State reads the NLRA and this Court's preemption decisions too narrowly. Although labor preemption is obviously concerned with the possibility of inconsistent state adjudication regarding the permissibility of conduct, that is not its only concern. On the contrary, as shown above, Congress was every bit as concerned about the remedies to be imposed and those to be withheld for NLRA violations.

[5] Congress may also have judged that the possibility of substantial penalties, unlike simple remedial provisions, might well make some protected activity too risky to undertake. *Automobile Workers v. Russell, supra*, 356 U.S. at 652-653 (dissent). For example, an employer whose business consists entirely of sales to the State of Wisconsin might well hesitate to lock out its employees—an activity with which a state may not interfere (*Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976))—since virtually any action taken with respect to employees creates some risk of an unfair labor practice finding. Although the employer might correctly consider the lockout entirely lawful and thus be willing to run the slight risk of being wrong and incurring backpay liability, the possibility of being put out of business would change the risk equation and might convince the employer to forego this protected activity.

ment embodied in the NLRA. Wisconsin has imposed a sanction (debarment) that has no relationship with the nature of an employer's unfair labor practices, that is not designed to cure the effects of the unlawful activity, and that is merely an *in terrorem* device to punish employers for unfair labor practices that have already been remedied by the NLRB's processes.[6] As made clear by the 1977 Congressional debates surrounding the consideration and rejection of debarment as a remedy for NLRA violations, debarment is not only a penalty, it is a drastic penalty clearly repugnant to the scheme of the NLRA:

> This new punitive sanction is akin to killing a fly with a sledgehammer. The sole purpose of this provision is to punish the employer rather than to remedy a violation of the law.

H 10637 Cong. Rec. (October 5, 1977).

> The debarment remedy transforms the National Labor Relations Act from a remedial statute into a severely punitive one—a transformation which turns the 42-year-old purpose of the act on its head.

H 10673 Cong. Rec. (October 5, 1977)

In sum, the remedial scheme established by the NLRA represents a delicate balance. Congress saw fit to *cure* unfair labor practices in order to put employees in a position to exert their collective bargaining strength. However, it did not permit punitive sanctions which might make the parties less likely to approach the bargaining table with a cooperative spirit. By adding but a simple remedy for NLRA violations, the State would have inter-

---

[6] It does not aid Wisconsin's cause to suggest, as it does, that a different conclusion is required because the State is not providing a remedy *to employees* for NLRA violations. That fact just establishes that the State-imposed sanction is punitive rather than remedial.

fered with that statutory scheme. By adding the "sledgehammer" penalty of debarment, the State has even more clearly interfered with the Act, especially in view of Congress' express rejection of that penalty in 1977. Accordingly, the State's debarment statutes must be preempted by the NLRA.

Aside from the punitive nature of Wisconsin's sanctions, the State's statutes impinge on the policies of the Act in a second major way—they represent a significant threat to the uniform, single, nationwide system of labor regulation that Congress sought.[7] This Court has long recognized that one of the driving forces behind the enactment of the NLRA "was the perceived incapacity of common-law courts and state legislatures . . . to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces. . . ." *Lockridge, supra*, 403 U.S. at 286. Accordingly, in enacting the NLRA Congress acted comprehensively in order to "obtain uniform application of its substantive

---

[7] There is yet a third way the statutes interfere with the NLRA —and this one is unrelated to the specific sanctions imposed. By applying the statutes only to court-enforced unfair labor practice findings, Wisconsin interferes with employers' right to seek judicial review of NLRB determinations. Although the Court of Appeals below rejected that concern on the ground that the imposition of harsher sanctions following appeal is not unusual "in our system of law" (750 F.2d at 614), the appellate court missed the point. The question is not whether, as a constitutional matter, stiffer penalties may be imposed after appeal. Rather, the question is whether a state may burden an appeal right provided in a federal statute, and particularly the NLRA. Here Congress obviously made the opportunity for judicial review an integral part of the federal statutory scheme, since it declined to make NLRB orders self-enforcing and gave aggrieved parties the right to petition federal courts for review of Board orders. 29 U.S.C. §§ 160(e) and 160(f). Just as obviously, that system is frustrated by a state debarment statute which is applied only when an employer has exercised its appeal rights contained in the Act.

rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies." *Garner v. Teamsters Union, supra*, 346 U.S. at 490. It is the recognition of these fundamental premises that underlies this Court's preemption decisions. *E.g., Garmon, supra*, 359 U.S. at 241-243.

Wisconsin's statutes violate these uniformity principles in two ways. First, as we have just discussed, the statutes impose an additional sanction not available under the NLRA, thus upsetting the uniformity between federal labor remedies generally and the remedies which are imposed on employers doing business with the State of Wisconsin. Second, permitting the Wisconsin statutes to stand would create a real potential for what could amount to different labor remedies in each of the 50 states.[8] For example, Wisconsin may debar multi-violators for three years; New Jersey may do the same for 10 years; and Indiana may choose not to debar anyone. New Hampshire may debar for one year only employers who discharge employees in violation of Section 8(a)(3) of the Act; Oregon may debar for seven years all who violate their Section 8(a)(5) duty to bargain in good faith, while neighboring Washington may debar all 8(a)(5) violators except those who engage in only a technical violation in order to gain court review of NLRB election case decisions. Ohio may decide that any employer who is found to have dominated a union in violation of Section 8(a)(2) shall never do business with that State. Iowa may decide that it will refuse to do business with any employer whose employees are represented by a union that has twice violated the NLRA in the prior two years; and North Carolina may decide to purchase only from

---

[8] The National Governors' Association has already identified four other states which have enacted debarment statutes which blacklist employers that have been found guilty of varying numbers of NLRA violations (National Governors' Association Brief at 2 n.1).

NLRA violators whose manufacturing facilities in that State are threatened because the companies have been debarred in so many other states.

Nor will debarment necessarily be limited to those who violate the NLRA. New York City may debar all employers with no collective bargaining agreements; the village of Mount Airy, Pennsylvania may debar struck employers; Dade County, Florida may debar any employer who lawfully locks out its employees, etc., etc.

The possibilities and permutations are endless because every government in the land buys goods and services. But the point is clear. If state and local governments may penalize those with whom they do business because the latter pursue a disfavored labor policy, there is little reason to believe that many years will pass before the single, consistent, nationwide remedial scheme of the NLRA will become a thousand different, varied and conflicting remedial schemes.[9]

In summary, the Wisconsin statutes now before the Court are preempted by the National Labor Relations Act. These statutes are specifically directed at the labor relations activities of private employers which are cov-

---

[9] The Court recognized the impermissibility of such a result in *Lockridge, supra* (403 U.S. at 288 n.5);

> [The dissent] apparently regards the remedial aspects of the federal scheme as unimportant to those who designed it. For example, assuming *arguendo* that petitioner's conduct was prohibited under both federal and state law, [the dissent] would deem it of no national significance if one State punished such conduct with a jail sentence, and another utilized punitive damages, while the NLRB merely awarded back pay. His position apparently is that Congress considered any state tribunal equally capable, with the Board, of assessing the appropriateness of a given remedy and was unconcerned about the disparities in the reactions of the States to unlawful union behavior. This argument, too, seems incompatible with the simple fact that Congress committed enforcement of the federal law here involved to a centralized agency.

ered by the Act, they do not promote any legitimate non-labor interests of the State, and they intrude seriously and substantially in numerous ways on the federal scheme of labor-management relations created by Congress in 1935. Indeed, but for the "market participant" twist, it is doubtful that this Court would have found the case worthy of review. We turn now to that issue and show why it should have no effect on the outcome dictated by traditional preemption principles.

B. The Wisconsin Statutes Are Not Saved From Federal Preemption By The Fact That The State Allegedly Acted As A "Market Participant" Rather Than As A Direct Regulator Of Labor Relations Conduct

Wisconsin argues here that its decision not to do business with companies that violate the NLRA cannot be preempted because the State is acting as a "market participant" and not as a direct regulator of labor relations conduct. The essence of the State's argument is that General Motors may refuse to do business with labor law violators, so why can't the sovereign state Wisconsin? The simple answer is that Wisconsin is a state which, despite its independent sovereignty, is subject to the United States Constitution, whereas GM is not.[10] Although that answer appears on its face to beg the question, we demonstrate below why it is the right answer.

Wisconsin's theory that its actions as a market participant are immune from preemption emanates from a series of decisions in which this Court has considered whether the "dormant Commerce Clause"—i.e., the implied proscription of state trade barriers when Congress has been silent on the subject—prohibits state and municipal governments from favoring their own citizens in the

---

[10] The entire point of the preemption doctrine is that state and local government action inconsistent with the acts of Congress is foreclosed by the Supremacy Clause of the Constitution. Private employer action, however, is not subject to the Supremacy Clause.

governments' own market transactions.[11] In those cases the Court concluded that "[n]othing in the purposes animating the Commerce Clause forbids a State, *in the absence of congressional action*, from participating in the market and exercising the right to favor its own citizens over others." *Alexandria Scrap*, 426 U.S. at 810 (emphasis added; footnotes omitted). Thus, these cases have come to "stand for the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause." *White*, 460 U.S. at 208.

This conclusion, however, cannot be divorced from the analytical framework that produced it. Of particular relevance here is the fact that the Court's consideration of these questions was "counseled by considerations of state sovereignty . . . and the 'long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" *Reeves*, 447 U.S. at 438-439, *quoting United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (footnotes omitted). Nevertheless, and of critical significance here, this recognition of the state's sovereignty and of the rights of private free traders did not end this Court's inquiry. Rather, the Court found it necessary to examine the purpose and history of the Commerce Clause to determine whether that constitutional provision prevented sovereign governments from exercising rights normally available to free traders to deal with whomever they choose.

In the above-cited cases the Court found that when a state acts as a simple market participant, rather than as

---

[11] *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (*"Alexandria Scrap"*); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (*"Reeves"*); *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983) (*"White"*); *South-Central Timber Development, Inc. v. Wunnicke*, —— U.S. ——, 81 L. Ed. 2d 71 (1984).

a market regulator, its actions do not violate the Commerce Clause—but only the Commerce Clause. The reason, of course, is that the distinction between "market participation" and "market regulation" by a state is relevant to the evils the Commerce Clause was designed to prevent. For example, in its first decision on the question, *Alexandria Scrap*, this Court engaged in a detailed review of the purposes and past application of that constitutional provision. It started with the basic premise underlying the Commerce Clause: "that this Nation is a common market in which state lines cannot be made barriers to the free flow of . . . goods in response to the economic laws of supply and demand." 426 U.S. at 803. Thus, the Commerce Clause "was designed in part to prevent trade barriers" (*id.* at 807), and the "common thread" in the Court's decisions finding violations of the Clause was the fact that "the State interfered with the *natural functioning* of the interstate market either through prohibition or through burdensome regulation." *Id.* at 806 (emphasis added). The Court distinguished the case before it, however (*id.*):

> By contrast, Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered the market itself to bid up the price.

In short, *Alexandria Scrap* and its progeny merely establish that, in the absence of Congressional action, the Commerce Clause proscribes only state action which erects an artificial, regulatory barrier to interstate commerce which, in turn, interrupts natural market supply and demand. It logically follows that a state does not transgress these Commerce Clause bounds by direct participation as a buyer or seller in the market—i.e., by, in effect, becoming part of the natural supply and demand in the market.

What is true with respect to the Commerce Clause, however, is not necessarily true with respect to other

constitutional provisions that the actions of a state may violate—a fact which Wisconsin and its *amici* virtually ignore. For example, no one would seriously contend that a state's decision to contract only with white-owned businesses is immune from scrutiny under the Equal Protection Clause merely because the state is acting as a market participant and asserts the same right as other free traders to choose its trading partners. Similarly, a state's debarment of contractors who refuse to waive immunity from prosecution and refuse to testify is not free of scrutiny under the Due Process Clause even though debarment can be characterized as a "market participant" decision in which the state is exercising its sovereign right to choose its trading partners. *See Lefkowitz v. Turley*, 414 U.S. 70 (1973). Finally by way of example, this point is perhaps best illustrated by this Court's decision in *United Building and Construction Trades Council v. Mayor and Council of Camden*, —— U.S. ——, 79 L. Ed. 2d 249 (1984), where the Court considered a Privileges and Immunities Clause challenge to a city ordinance establishing a hiring preference for city residents on city construction projects. The Court distinguished the *Camden* case from its earlier decision in *White, supra*, where it had upheld a similar Boston executive order under Commerce Clause challenge (79 L. Ed. 2d at 259-260):

> Our decision in White turned on a distinction between the city acting as a market participant and the city acting as a market regulator. . . . But the distinction between market participant and market regulator relied upon in White to dispose of the Commerce Clause challenge is not dispositive in this context. The two Clauses have different aims and set different standards for state conduct.
>
> . . . [T]he fact that Camden is merely setting conditions on its expenditures for goods and services in the marketplace does not preclude the possibility that those conditions violate the Privileges and Immunities Clause.

For present purposes, then, the critical question is *not* whether the Commerce Clause reaches state action as a market participant when Congress has not spoken, *but rather*, whether the Supremacy Clause reaches such activity when Congress has comprehensively legislated as it has in the NLRA. We submit that it does.

The Supremacy Clause of the Constitution (Art. VI, Cl. 2) directs that the acts of Congress shall be supreme over those of the states. As such, it forms the constitutional basis for the labor preemption doctrine that prohibits states from enforcing laws that will interfere with or frustrate the federal scheme of labor-management relations embodied in the NLRA.

Unlike the Commerce Clause with its "animating purpose" to remove artificial trade barriers, nothing in or animating the Supremacy Clause suggests that there is any operative distinction between state action as a market participant and its action as a regulator of conduct. Indeed, logic dictates that the comprehensive acts of Congress, in this case the NLRA, can be interfered with and frustrated just as easily by a state acting as a market participant as by a state acting as a regulator of conduct. For example, if state actions are immunized from Supremacy Clause challenges merely because the state is acting as a "market participant" and exercising its "free trader" right to choose with whom to deal, then there is no reason why a state cannot take the following actions despite the existence of the NLRA:

—debar any employer that has a collective bargaining relationship with a union that has violated the NLRA;

—debar any employer whose employees engage in a strike;

—debar any employer whose employees have filed an unfair labor practice charge;

—debar any employer that has engaged in a lawful lockout;

—debar any employer that has been picketed during the preceding year;

—debar any employer whose employees concertedly refuse to work overtime; etc.

Each of these actions interferes with rights and obligations that are either specifically covered by the NLRA or that, under the Act, are designed to be free from governmental intervention. *See Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Comm'n, supra.* Why, then, for Supremacy Clause purposes, should it make any difference whether the state's interference is through market participation or through regulation?

In short, the purposes and policies of the National Labor Relations Act are just as easily frustrated through market participation as through direct regulation of conduct. Accordingly, given the purposes animating the Supremacy Clause—i.e., that the acts of Congress shall preclude inconsistent state action—a state's actions, whether as "market participant" or "regulator of conduct," should be subject to scrutiny under the same labor preemption standards.[12]

Even if that were not the case, however, the Wisconsin debarment statutes here in issue would still be preempted. As we show below, those statutes embody the regulation of conduct rather than merely the permissible decisions of a market participant.

---

[12] *Cf. New York Telephone Co. v. New York Department of Labor*, 440 U.S. 519 (1979) (New York law providing payment of unemployment compensation to strikers scrutinized for interference with purposes and policies of NLRA, but ultimately held permissible because of legislative history indicating Congress intended the states to have this freedom); *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967) (Supremacy Clause violated by interpretation of state's unemployment compensation law that would render persons filing NLRB charges ineligible for unemployment compensation).

In the cases in which the market participant exception has been deemed dispositive of Commerce Clause claims, the state and local governments had based their market decisions on where their potential trading partners lived or worked, not on their conduct. Thus, the governments' actions could not constitute regulation of conduct, since the conduct of the potential traders could not affect the governments' decision whether to deal.[13]

Where a state has gone further, however, and imposed conditions regulating the conduct of its potential trading partners, the state's actions have properly been found to be regulatory in nature and subject to the prohibitions of the Commerce Clause. As the plurality stated in *South-Central Timber Development, Inc. v. Wunnicke*, *supra*, 81 L. Ed. 2d at 83:

> Contrary to the State's contention, the [market participant] doctrine is not carte blanche to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity. . . .
>
> . . . [A]lthough the State may be a participant in the timber market, it is using its leverage in that market to exert a regulatory effect in the processing market, in which it is not a participant.

---

[13] This was precisely the distinction recognized by the Court in *White*, a case in which the Mayor of Boston was alleged to have violated the Commerce Clause by adopting an executive order requiring that all city-funded construction projects be performed by a workforce consisting of at least 50 percent Boston residents. The dissent argued that the mayor's action went beyond market participation because it regulated employment contracts between public contractors and their employees (460 U.S. at 211 n.7, 217, 220). Although recognizing that there are limits on a state's ability to impose conditions, the majority rejected the dissent's argument because "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the city.'" *Id.* at 211 n.7.

This same rationale can be applied with equal force in the instant case. Wisconsin has used its buying power as leverage to exert a regulatory effect on the conduct of employers—i.e., their compliance with the NLRA. This conclusion flows not only from Wisconsin's admission that the purpose of the statutes is to discourage labor law violations by employers (576 F. Supp. at 1297), but from the nature of the statutes themselves.

First, there can be no doubt that the availability of debarment from government contracting is a potent means of regulating conduct.[14] Indeed, those employers whose business dealings are mainly with governments (road builders, manufacturers of traffic lights, printers and publishers of secondary school books, etc.) are threatened with extinction by a debarment penalty. Further, one searches the Wisconsin statutes in vain for any purpose to be served by the statutes *other than* the regulation of labor relations conduct. Certainly there is no purpose related to normal market participation decisions or even to a desire to further the economic well-being of Wisconsin's citizenry. In particular, Wisconsin's decision not to purchase from an NLRA violator has nothing to do with the price or quality of the goods being offered for sale. Indeed, there is no connection whatsoever between the seller's NLRA violations and the goods being purchased.[15] . Moreover, the statutes confer no benefit

---

[14] Congress itself has recognized the potency of the debarment remedy in regulating conduct. *See, e.g.*, the Walsh-Healey Act, 41 U.S.C. § 37; the Service Contract Act, 41 U.S.C. § 354; the Davis-Bacon Act, 40 U.S.C. § 276a-2. As pointed out previously, however, Congress specifically determined that debarment should not be applied to remedy Labor Act violations, in part because it was too potent a penalty.

[15] In this case, for example, the Gould division which would have lost its State contracts had not committed any unfair labor practices. Further, Gould had remedied all its unfair labor practices, and had sold the component parts of its business in which those unfair labor practices had been committed, before it was debarred from

upon local industry and offer no jobs or employment protection to Wisconsin's citizens.[16] Finally, whatever may be said regarding the statutes' regulatory nature as applied to state contractors who have themselves violated the NLRA, the statutes are clearly regulatory as applied to state contractors who merely do business with labor law violators. Since Wisconsin notifies its potential vendors that the State will not buy their products which contain components produced by identified labor law violators, the State is regulating the conduct of those vendors by forcing them to cease doing business with the blacklisted employers in order to maintain their contracts with the State.

In sum, Wisconsin's debarment statutes under attack in this case had but one purpose and effect—the regulation of labor relations conduct of all employers in this country who might ever seek to do business with the State. In enacting these provisions Wisconsin may well have been motivated by its "deeply rooted interest in compliance with the labor laws" (750 F.2d at 611) and by its judgment that the remedies under the National Labor Relations Act simply are not sufficiently stringent to effectively punish violators of that federal statute. However, this Court's preemption decisions squarely foreclose the State from acting on these beliefs and judgments, because Congress has imposed *its* beliefs and judgments on what this nation's labor policies should be. Accordingly, Wisconsin's debarment statutes cannot stand.

---

selling goods to the State of Wisconsin. Accordingly, the goods being offered to Wisconsin could not have been "tainted" by Gould's unlawful conduct.

[16] In this case, all of Gould's unfair labor practices were committed against citizens and residents of states other than Wisconsin.

CONCLUSION

For the foregoing reasons, the Chamber respectfully submits that the judgment of the Seventh Circuit should be affirmed on the ground that the Wisconsin statutes violate the Supremacy Clause.

Respectfully submitted,

Of Counsel:

STEPHEN A. BOKAT

NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

PETER G. NASH *
DIXIE L. ATWATER

OGLETREE, DEAKINS, NASH, SMOAK & STEWART
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-0855

Counsel for the Chamber of Commerce of the United States of America, Amicus Curiae

* Counsel of Record

Dated: September 10, 1985